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Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
Implementation of the)
Pay Telephone Reclassification)
and Compensation Provisions of the)
Telecommunications Act of 1996)

CC Docket No. 96-128

JUL 21 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

Comments of AirTouch Paging

Mark A. Stachiw
Ernie F. Stewart
AirTouch Paging
12221 Merit Drive, Suite 800
Dallas, Texas 75251
(214) 860-3200

Carl W. Northrop
Paul, Hastings, Janofsky,
& Walker
Tenth Floor
1299 Pennsylvania Avenue
Washington, D.C. 20004
(202) 508-9500

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SUMMARY

AirTouch Paging ("AirTouch"), a local, regional, and nationwide provider of paging and narrowband PCS services, herewith submits its comments in the Commission's proceeding implementing the provisions of Section 276 of the Telecommunications Act of 1996, which mandates fair compensation for payphone service providers.

The focus of AirTouch's comments is on the Commission's proposal to adopt a compensation plan for 800 subscriber calls. AirTouch believes that the a uniform rate of compensation should be established at the federal level, rather than in piecemeal fashion by the States. The Supreme Court has held that the Commission may preempt State regulation for an interstate matter when it is "not possible to separate the interstate and intrastate components," of the Commission's rules; 800 numbers are inherently interstate in nature.

With respect to the question of what entity should bear the cost of providing compensation to the PSP, AirTouch favors a "set use fee" to be paid by the calling party, rather than the "carrier pays" system proposed by the Commission. A set use fee serves the public interest by promoting competition, and will not unduly burden payphone users, PSPs, or 800 number subscribers.

COMMENTS OF AIRTOUCH PAGING

AirTouch Paging and its affiliates¹ ("AirTouch"), by its attorneys, respectfully submits its comments in response to the Notice of Proposed Rulemaking² (the "Notice") released June 6, 1996 in the above-captioned proceeding. The following is respectfully shown:

I. Preliminary Statement

AirTouch has a substantial basis in experience for informed comment in this proceeding. AirTouch provides one-way paging and messaging services in 167 markets in 30 states, with over 2.4 million pagers in service. AirTouch currently provides local, state, regional and nationwide service.³ AirTouch was also the high bidder on one nationwide 50/12.5 kHz Narrowband PCS license and three regional 50/12.5 kHz Narrowband PCS licenses. As the Commission has observed on prior occasions, the messaging industry is a Commission success story that is highly competitive.⁴ The industry currently enjoys competition from more than 600 service providers, and, with increased

¹ The licensed affiliates of AirTouch Paging are: AirTouch Paging of Virginia, Inc., AirTouch Paging of Kentucky, Inc., AirTouch Paging of Texas, AirTouch Paging of California, and AirTouch Paging of Ohio.
² FCC 96-254.
³ AirTouch has two nationwide CMRS authorizations.
⁴ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, FCC 96-52 (released February 9, 1996).

subscription, costs are declining.⁵

AirTouch uses 800 numbers (and other toll-free numbers) in the provision of its Commercial Mobile Radio Service ("CMRS"), paging and messaging services. AirTouch uses 800 numbers both as an end-user subscriber for business calls,⁶ and also resells 800 numbers as part of its CMRS services to originate pages, to originate voicemail, and to retrieve voicemail.⁷

AirTouch, through its parent AirTouch Communications, Inc., has filed comments in the Interconnection and Compensation dockets.⁸ While AirTouch applauds the Commission's efforts to quickly resolve all issues relating to the Telecommunications Act of 1996⁹ (the "1996 Act"), it disagrees with the way in which the Commission proposes to implement Section 276 of the 1996 Act.

II. Background

The underlying principle of the 1996 Act is to spur and promote competition. Congress, in enacting the 1996 Act, found

⁵ Id. at para. 6-7.

⁶ For example, AirTouch uses 1-800-6AIRTOUCH for retail customers to activate their pagers.

⁷ These 800 numbers may be either a single 800 number requiring the subscriber to enter a Personal Identification Number (PIN), or a personal 800 number assigned only to that subscriber.

⁸ Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rule Making, 11 FCC Rcd 5020 (1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-108, Notice of Proposed Rule Making, released April 19, 1996.

⁹ Pub. L. No. 104-104, Section 101(a), 110 Stat. 56 (1996), to be codified at 47 U.S.C. Section 253(a) et seq. (1996).

that compensation for all calls made from payphones, regardless of who owns the payphone, would serve the public interest.¹⁰ To this end, Section 276 of the 1996 Act requires fair compensation for all payphone owners along with the elimination of subsidies paid to the local exchange carriers' payphone operations for payphones, which skew the competitive playing field.¹¹ In order to implement these requirements, the 1996 Act mandates that the Commission establish new regulations to promote competition among payphone service providers.¹² In light of this mandate, the Commission is seeking comment on its proposed rules regarding compensation and nonstructural safeguards to promote and protect competition.

As a threshold issue, the Commission seeks comment on whether payphone compensation rates should be set at the federal level or left to the states.¹³ The Commission, however, does not draw any conclusions about whether federal or state regulation is appropriate, serves the public interest, or will promote competition among payphone service providers ("PSPs").¹⁴

The Commission then explains three possible options for ensuring fair compensation for these calls,¹⁵ and seeks comment on which option will ensure fair compensation and promote

¹⁰ Joint Explanatory Statement of the Committee of Conference, preamble.

¹¹ 47 U.S.C. § 276.

¹² 47 U.S.C. § 276(b)(1).

¹³ Notice, para. 20.

¹⁴ Notice, para. 21-22.

¹⁵ Notice, para. 21-22.

competition among PSPs with respect to local coin sent-paid calls.¹⁶ Under the first option, the Commission would set a nationwide local coin rate for all calls originated by payphones.¹⁷ Under the second option, the Commission would prescribe specific national guidelines that states would use to establish local rates that would ensure that all PSPs are fairly compensated.¹⁸ Under the third option, the states would continue to set the coin rates for local payphone calls according to factors within their discretion.¹⁹

The Commission also states that the 1996 Act mandates that PSPs be fairly compensated for originating 800 subscriber calls.²⁰ The Commission proposes three possible payors: the caller, the interexchange carrier ("IXC"), or, in the case of subscriber 800 calls, the entity being called (which may or may not directly pass all the charges on to the caller using the payphone).²¹ The Commission implies that the appropriate payor should be the IXC.²²

In addition, the Commission proposes three different compensation arrangements: coin deposit,²³ "carrier pays,"²⁴

¹⁶ Notice, para. 21-22.

¹⁷ Notice, para. 21.

¹⁸ Notice, para. 21.

¹⁹ Notice, para. 22.

²⁰ Notice, para. 20.

²¹ Notice, para. 24.

²² Notice, para. 25.

²³ Notice, para. 24. This arrangement may not work for IXC access calls under TOSCA, but would be permissible under the 1996 Act for 800 subscriber calls to CMRS providers because CMRS providers are not a "provider of operator services" under Section 226(a)(9) of TOCSIA.

and "set use fee."²⁵ For non-coin payphone calls, the Commission tentatively concludes that either the "carrier pays" or "set use fee" proposal satisfies the requirements of the 1996 Act.²⁶ For coin-operated payphones, the Commission rejects coin-deposit as a payment mechanism on the grounds that coin-deposit "would appear to unduly burden many transient payphone callers by requiring them to deposit coins in addition to providing call-billing information."²⁷

The Commission tentatively finds that existing procedures will support a completed per-call compensation plan.²⁸ The Commission also tentatively concludes that it should adopt a "carrier pays" compensation mechanism that builds on these procedures, under which the IXC would compensate the PSP.²⁹

The Commission also tentatively concludes that the current direct billing arrangements for access code calls existing today between IXCs, intrastate interexchange providers and PSPs should continue, but should be modified to include 800 subscriber calls.³⁰ The Commission also finds that the compensation paid to PSPs should be cost-based, rather than based on lost opportunity.³¹

²⁴ Notice, para. 25.

²⁵ Notice, para. 26.

²⁶ Notice, para. 28.

²⁷ Notice, para. 27.

²⁸ Notice, para. 28.

²⁹ Notice, para. 28.

³⁰ Notice, para. 33.

³¹ Notice, para. 33.

III. The Compensation Method Chosen Should Be Implemented at the Federal Level

AirTouch supports uniform, nationwide rules because CMRS, and paging in particular, are comprised of both intrastate and interstate services.³² For example, most 800 subscriber calls used by CMRS providers are part of the underlying CMRS service, such as initiating multistate or nationwide pages, originating regional or nationwide voicemail, and retrieving voicemail in a multistate or nationwide coverage area. The benefit of an 800 number is to allow calling parties located anywhere in the United States to place calls to the called party without paying interexchange toll charges.³³ Allowing states to set these rates would subject the paging industry to a multiplicity of charges that could be different in each state. Many paging companies have operations which are concentrated in one or more regions of the United States, but, unlike the IXC companies, paging companies do not operate in every state. To allow states to set these charges could subject paging companies to charges in jurisdictions in which they have no presence. Setting one rate at the national level for these calls will

³² The Commission has on numerous occasions found that paging services are interstate in nature and therefore are exempt from certain state regulations. See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

³³ Paging companies have experienced substantial demand for 800 service in conjunction with their CMRS services. In fact, virtually all regional and nationwide paging services have a 1-800 number associated with them.

ensure a level playing field for all participants.

In addition, subjecting AirTouch to multiple state regulations would negatively impact CMRS services. The rates charged by CMRS providers are preempted by Section 332 of the 1993 Omnibus Budget Act.³⁴ In many cases, the 800 charge itself is embedded in the CMRS charge. To have 800 subscriber calls regulated at the state level would subject CMRS providers to prohibited state rate regulation, and could result in double charges to the CMRS provider.³⁵

Moreover, the Commission has jurisdiction to establish a uniform rate at the national level. The common carrier provisions of the Communications Act³⁶ establish "a system of dual state and federal regulation over telephone service."³⁷ Under this system, the Commission retains exclusive jurisdiction over interstate matters pursuant to Section 1 of the Communications Act, while Section 2(b) generally reserves to the states the authority to regulate intrastate communications.³⁸ These spheres of jurisdiction, the courts have recognized, often overlap because most aspects of telecommunications have both

³⁴ 47 U.S.C. § 332(c)(3).

³⁵ For example, under the Commission's proposal, the CMRS provider could be required both to pay the IXC for providing it with the 800 number and to compensate the PSP for the call, particularly if the CMRS provider is not able to pass the charge on to its subscriber.

³⁶ 47 U.S.C. § 152(b).

³⁷ Louisiana Public Service Commission v. FCC, 476 U.S. 355, 360 (1986).

³⁸ 47 U.S.C. § 152(b).

interstate and intrastate components.³⁹ When this occurs, Louisiana PSC establishes that the Commission may preempt state regulation for an intrastate matter when it is "not possible to separate the interstate and the intrastate components of the asserted Commission regulations"⁴⁰ or when state regulation "would negate valid Commission regulatory goals."⁴¹

The Commission may thus preempt the states in those circumstances involving both interstate and intrastate components where (1) preemption is required to protect a valid federal regulatory objective; and (2) the state regulation would negate the Commission's exercise of its lawful authority because, as a practical matter, the interstate and intrastate components of regulation are inseverable.⁴²

800 numbers are inherently interstate in nature. For instance, national directories are used to assist nationwide toll-free calling. Furthermore, 800 numbers used with CMRS are national, or at least multistate, in nature. Therefore, there is a strong national interest in having uniform rates and regulations that apply to 800 numbers. These rates and regulations should be established by the Commission at the

³⁹ See Public Service Comm'n of Maryland v. FCC, 909 F.2d 1510, 1514 (D.C. Cir. 1990); Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325, 1329 (D.C. Cir. 1989).

⁴⁰ 476 U.S. at 375, n.4.

⁴¹ California v. FCC, 39 F.3d 919, 931-933 (9th Cir. 1994).

⁴² See Public Service Comm'n of Maryland, supra, 909 F.2d at 1515; see, e.g., Louisiana PSC, 476 U.S. at 375 n.4; California v. FCC, supra, 39 F.3d at 931-933; Texas PUC, supra, 886 F.2d at 1332 - 34; Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 113-115 (D.C.Cir. 1989).

national level to ensure that the public interest is served and that competition is fostered.

IV. The Commission's Proposed Payment Mechanism Does Not Serve the Public Interest

The Commission's tentative plan does not serve the public interest. AirTouch agrees that the 1996 Act requires that all PSPs be fairly compensated. The real question, however, is how such compensation should be provided and in what amount.

As set forth earlier, AirTouch's customers use 800 subscriber numbers to initiate interstate pages, initiate voice mail, and retrieve voicemail. Under either the "carrier pays" or the "set use fee" mechanism, CMRS providers could be required ultimately to pay the charges incurred for compensating PSPs for 800 subscriber calls. Thus, the Commission's proposal would allow calling parties to impose charges on the CMRS provider which they have not agreed to pay and which they have no control over.⁴³ For example, various PSPs could charge different rates which the CMRS provider could ultimately be required to pay even though the CMRS providers have no control over where or on what

⁴³ For example, the paging industry generally uses a "block-based" pricing mechanism under which it charges its customers a flat monthly fee for a certain amount of 800 number calls. 800 number calls in excess of this amount are charged on a per-call basis. The Commission's proposal would undermine this pricing structure. Indeed, the paging industry does not generally have billing mechanisms to pass on itemized usage charges such as this to its customers.

payphone calls are initiated.⁴⁴

The Commission's proposal also does not further the overall goals of the 1996 Act to promote competition because it does not economically incent the person who has the ability to choose the lowest cost service, the calling party, to choose between competitors' services.⁴⁵ Under the current proposal, the calling party is indifferent to the charges paid by the IXC to the payphone provider. If those charges are passed on to, or directly imposed on, the CMRS provider, the CMRS provider will be faced with: (i) raising rates to its subscribers; (ii) having its costs raised without an ability to pass those costs on to its subscribers; (iii) having to tell subscribers not to use certain payphones; or (iv) blocking calls made from certain payphone providers with which it either does not have an agreement or whose charges are too high. None of these options serve the public interest because they raise prices or restrict availability of services.

Furthermore, the Commission's proposal harms the paging industry. Paging is a Commission success story, with increased geographic coverage, enhanced customer service, and declining prices. Paging is highly competitive and cost-sensitive; it cannot afford cost increases which it will not be able to

⁴⁴ This differs from toll charges because customers (or the CMRS provider) choose the interexchange carrier, so the rates are fixed.

⁴⁵ For example, if there are two payphones next to each other, the customer may choose either phone although the rates may be substantially different.

effectively pass on to its customers.⁴⁶

In addition, the paging industry does not have billing mechanisms in place to pass on 800 subscriber call costs to its customers.⁴⁷ Implementing a charge-through mechanism would cost more than actual payment of the charges, thus representing a drain on revenue.⁴⁸

In the Notice, the Commission also seeks comments on preventing fraudulent uses of autodialers at payphones.⁴⁹ AirTouch has had experience with this problem in the past with entities which have used autodialers to page AirTouch's customers. Federal law prohibits the use of autodialers to call a device which is charged for the call.⁵⁰ Presumably, the same prohibition would apply to connecting autodialers to payphones in order to fraudulently increase compensation. Moreover,

⁴⁶ As is customary in the industry, AirTouch typically charges its customers a flat monthly fee for a certain number of calls on a given service, with an additional charge for calls in excess of that amount. CMRS providers do not have a reliable way to pass on to their customers the charges that would be imposed on the providers under the Commission's proposal, and would therefore have to absorb those additional costs which are neither predictable nor controllable.

⁴⁷ Paging providers do not have the ability to charge their customers a real usage fee because the paging providers do not have control over where their customers originate 800 calls.

⁴⁸ Nor is it clear how many calls are originated from payphones onto the CMRS providers' networks.

⁴⁹ Notice, para. 23.

⁵⁰ 47 U.S.C. § 227 provides: "It shall be unlawful for any person ... to make a call using any automatic telephone dialing system ... to any telephone number assigned to a paging service."

implementing a "calling party pays" compensation mechanism would remove any incentive for a payphone owner to attempt to fraudulently generate compensation by use of an autodialer.

**V. A "Set Use Fee" Paid By the Calling Party
Serves the Public Interest**

AirTouch believes that the appropriate payment mechanism to compensate PSPs for 800 subscriber calls is a "set use fee" paid by the calling party. The benefit of a "set use fee" is that it is independent of minutes of usage. Because the calling party would know that the fee is required for 800 subscriber calls from payphones, he or she will not be surprised or unduly burdened by the fee but will expect it, and can choose to make the call from a non-payphone in order to avoid a fee.⁵¹

"Calling party pays" also serves the public interest because the calling party has the appropriate economic incentives to choose the most competitive PSP. Under the "calling party pays" mechanism, the fact that the calling party has such a choice will force the PSP to be competitive and the consumer will reap the benefits in the form of better services at lower prices. In addition, the "calling party pays" mechanism furthers competition because each PSP must charge a competitive fee or risk having the customer use someone else's payphone.

In addition, the "calling party pays" mechanism can be

⁵¹ This is very similar to the fees charged by hotels for 800 calls made on telephones located in their rooms. These fees are usually posted on or near the telephone, and, for the most part, are also "set use fees."

easily implemented by requiring that the coin be deposited in the payphone for all 800 subscriber calls. If the call is an access call, the coin could be returned in compliance with TOSCIA.⁵² Alternatively, "smart" payphones could recognize the access number and not require coins to place those calls. This would not unduly burden the user as long as the coin rate is a uniform rate, set at the national level, because the user would know in advance that any payphone he uses for an 800 call will require that coin.

In addition, "calling party pays" does not harm the paging industry because it requires compensation to be paid to the PSP by the party most able to control it, the payphone user. This benefits the public interest by allowing CMRS providers to continue to develop competitive interstate and nationwide services without having to absorb costs that they can neither predict nor control and without having to divert resources from the development of these services in an attempt to develop some sort of billing mechanism that would account for these costs.

Therefore, AirTouch urges the Commission to adopt a mechanism under which the calling party pays for 800 subscriber

⁵² TOCSIA's prohibition in Section 226(e)(2) against advance payment by consumers does not apply to 800 subscriber calls made to CMRS providers because CMRS providers are not "providers of operator services" as defined in Section 226(a)(9) of TOCSIA.

calls originated on a coin-operated payphone.⁵³ This mechanism would best serve the public interest by promoting the goals of the 1996 Act to establish non-discriminatory competition in the telecommunications arena.

Coinless payphones, however, may not serve the public interest because they remove from the user the ability to choose and, hence, the incentive for PSPs to charge competitive rates for competitive services. Thus, for coinless payphones, the Commission has at least two options, both of which promote a level playing field and, hence, competition. First, the Commission could require that the premises owner where the coinless payphone is located collect compensation. Second, the Commission could determine that the payphone owner, by electing to use coinless payphones, has waived compensation under Section 276. Neither of these options would conflict with the promotion of the public interest that is achieved by the "calling party pays" mechanism. In addition, these options avoid the burdens imposed if the paging industry is required to pay charges over which paging service providers have no control or ability to predict, nor the ability to pass through to their customers.

The Commission's overall goal in implementing rules in accordance with Section 276 of the 1996 Act is to ensure that all payphone service providers are fairly compensated for 800

⁵³ Indeed, the Commission itself recognized that this was the "ideal solution" in its Memorandum Opinion and Order in the Access Charge proceeding (Phase I), CC Docket No. 78-72, FCC 83-356, adopted July 27, 1983.

subscriber calls. This goal can be accomplished without disturbing the current compensation mechanisms by continuing to require the calling party to pay, in the case of coin-deposit payphones, and, in the case of coinless payphones, by either allowing the premises owner to collect compensation or by determining that the payphone owner has waived compensation. In addition, this solution benefits the public interest by forcing payphone service providers to competitively price their services to the user, and avoids imposing on the paging industry burdensome and unnecessary costs which could undermine competition and inhibit development of enhanced services.

VI. Conclusion

The foregoing premises having been duly considered, AirTouch respectfully requests that the Commission: (i) adopt a federal regulatory scheme with respect to 800 subscriber calls, and (ii) adopt a "set use fee" to be paid by the calling party.

Respectfully submitted,

AirTouch Paging

By: Carl W. Northrop
Carl W. Northrop
Mark A. Stachiw
Emie F. Stewart

Its Attorneys

Mark A. Stachiw, Esq.
Emie F. Stewart, Esq.
AirTouch Paging
12221 Merit Drive, Suite 800
Dallas, Texas 75251
(214) 860-3200

Paul, Hastings, Janofsky,
& Walker
Tenth Floor
1299 Pennsylvania Avenue
Washington, D.C. 20004
(202) 508-9500

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